16293

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 174.

JOHN D. BOERING AND MEARLIN G. BOERING, HIS WIFE,
Plaintiffs in Error,

vs.

CHESAPEAKE BEACH RAILWAY COMPANY.

BRIEF SUBMITTED ON BEHALF OF PLAINTIFFS IN ERROR.

This is an appeal from an order of the Court of Appeals of the District of Columbia affirming the judgment in favor of the defendant in error rendered herein in the supreme court of the District of Columbia on March 3, 1902.

The facts relied upon in the circuit court by the plaintiffs in error and the assignments of errors to the Court of Appeals of the District of Columbia, which are also relied upon in the Supreme Court of the United States, are briefly as follows:

Statement of Facts.

On September 2, 1900, Mr. and Mrs. Boering and a Mr. Burke were on one of the passenger trains of the defendant returning to Washington from Chesapeake Beach. The

train near Chesapeake Junction left the main track and, running through an open switch, collided with a string of empty coaches left upon the siding.

Mrs. Boering was severely injured. The collision was the result of gross negligence, not only on the part of the defendant's agents and employees, but also on the part of the defendant itself. The switch was unprovided with the customary lights and warning signals and was without a watchman, and had remained open ever since the earlier train had come in and been left on the siding. (See testimony of Walters, Daley, and Riordan, Rec., p. 9.)

Mrs. Boering, for conformity, joining her husband in the action, brought suit against the defendant, which, among other pleas, set up that she was a gratuitous passenger, riding upon a free pass with the following stipulation printed in legible type on the back thereof:

"The person accepting and using this pass thereby assumes all risk of accident and damage to person or property, whether caused by negligence of the company's agents or otherwise" * * * (Rec., p. 5).

To this plea the plaintiffs demurred, but the demurrers were overruled.

At the trial the pass was admitted in evidence (Rec., p. 11) over plaintiffs' objection, notwithstanding there was no evidence that the female plaintiff ever saw, was aware of, or assented to the stipulation on the back thereof, or knew the terms of its procurement, or indeed knew it was a free pass. It then further appeared that General Passenger Agent Lewis, during the negotiation of an advertising contract with the Moxley Advertising Company, of which Mr. Boering was an agent, gave the latter a number of passes for the general manager and other officers of the Moxley Advertising Company, and two for Mr. and Mrs. Boering. The pass to Mr. Boering was identical with that to Mrs. Boering, except that his read "Acc. adv. contract, Moxley adv. service,"

and the one bearing her name "Complimentary" (Rec., p. 11).

Mr. Boering testified that he had kept both passes in his pocket-book except on the several occasions when he had exhibited them to the conductor, and that Mrs. Boering had never seen them, nor had he told her more about them when inviting her to go with him than that he had been given transportation "in conjunction with the contract for advertising" (Rec., p. 12).

Mrs. Boering also testified that she never had seen the passes until after the accident (Rec., pp. 9–10).

ASSIGNMENT OF ERRORS.

I. The court below erred in admitting in evidence the pass upon which Mrs. Boering was riding (Rec., p. 10).

II. The court erred in admitting said pass in evidence until a foundation had been laid therefor by showing that Mrs. Boering knew the contents thereof (Rec., pp. 9–10).

III. The court erred in admitting said pass in evidence after Mrs. Boering's denial on cross-examination that she had ever seen it until after the accident, this being all the evidence on that point at the time the said pass was so admitted in evidence (Rec., pp. 9–10).

IV. The court erred in refusing to allow Mr. Boering to answer the following questions:

(*a.*) "Did Mrs. Boering ever see the conditions on the back of this ticket prior to the time of the accident; the ticket that was made out in her name?"

(*b.*) "Did Mrs. Boering ever authorize you to procure a free pass for her over the Chesapeake Beach railroad?"

(*c.*) "Did Mrs. Boering ever assent to you waiving her right to a recovery from this company for negligence?"

(*d.*) "Did Mrs. Boering ever, in any way, assent to your procuring transportation for her over this railroad and relieving the company from any liability therefrom on the grounds of negligence?" (Rec., p. 13).

V. The court erred in refusing to grant the plaintiff's second and third prayers (Rec., p. 14).

ARGUMENT.

The contention of the plaintiffs in error presents to this court only two questions of law, one involving the validity of a stipulation printed on the back of a free pass purporting to relieve a railway carrier from liability to a gratuitous passenger from injury caused by the negligence of the carrier; and if that point be decided in favor of the carrier's non-liability, then whether such exemption can be extended to the case of a married woman who was injured while riding on the invitation of her husband, an advertising solicitor, to whom the pass had been issued in her name, but without her knowledge or request, and of the stipulation on the back of which she was ignorant at the time of the injury and whose only knowledge concerning the same was that it was "transportation procured in conjunction with a contract for advertising."

These two points, which cover all the assignments of error, are hereinafter separately discussed.

Point 1.

A public carrier may not limit its common-law liability for negligence to passengers by special agreement. This rule, founded on public policy, operates no less for the protection of gratuitous passengers than for passengers for hire.

Believing the law to be as above stated, the plaintiffs in error are willing to concede, for the purposes of argument, that the plaintiff was the holder of that rare if not entirely non-existent thing called a free pass. This court in Phila. & Reading R. R. *vs.* Derby, 14 How., 485, has said that a pass is not free or gratuitous in the sense in which these words were used by the learned court below if the consideration therefor be "pecuniary or otherwise." It is not sought to give a greater significance to the use of these words than this court perhaps attached to them; but in view of the language of the court below to the effect that from any point of view, however, the only rational inference from the witness' entire statement is that there was no contract embracing the issue of the pass to his wife, but that it was a gratuity a compliment as expressed on its face (opinion, Rec., p. 19), and in view of the approval with which the court below quotes the language of Judge Putnam (Duncan *vs.* Maine Cen. R. R. Co., 113 Fed. Rep., 508), to the effect that the denial of the right of recovery to "a mere seeker and recipient of favor" "conforms the law to the moral sense which justly holds those who accept gratuities and acts of hospitality to perform the condition on which they were granted" (opinion of the court, Rec., p. 21), the plaintiffs in error are constrained to insist that the record abundantly discloses that, whether the consideration for their carriage comes within the classification of "pecuniary or otherwise," they, and certainly the female plaintiff, were neither the seekers nor recipients of favor.

Moreover, it is submitted that the very facts set out in the opinion of the learned court below as follows:

"Mr. Boering was called on behalf of the plaintiff, and testified that he was advertising solicitor and superintendent for 'Moxley bill-posting service.' His testimony corroborated that of his wife and others respecting the accident. Afterwards he was recalled by the plaintiff, and, as recited in the bill, gave evidence tending to prove that at the same time the pass for Mrs. Boering was given him there were given to witness four other passes, two being to Mr. Shoemaker, general manager of the Moxley advertising service, and Mrs. Shoemaker; one to Mr. Edwards, the Baltimore agent of the advertising service, and one to Mr. J. D. Boering, one of the parties named as plaintiff in this action, all being issued at the same time and pursuant to the same conversation with General Passenger Agent Lewis, of the Chesapeake Beach Railway Company.

"He was then permitted to read his own pass, which was similar to hers, save that it read 'Pass Mr. J. D. Boering,' and instead of 'Complimentary,' read—'Acc. adv. contract Moxley ad. service' (opinion, Rec., p. 17)."

indicate that the pass given to Mr. Boering for his wife and marked "Complimentary" was no more complimentary than the drovers' pass in the drovers'-pass cases or the pass given Mr. Boering, which frankly conceded on its face that it was given on "Acc. adv. contract Moxley ad. service."

If the law, uncertain as it sometimes is, must be "made to conform" to a highly sensitive moral sense, differing in each individual, and the pronouncements of which are not susceptible of review by any earthly tribunal, the plaintiffs in error insist that the facts of this case enable them to maintain their action without any forfeiture of proper self-respect. It may be that really free passes at times have been given and accepted in fraud of the stockholders, for whom the officers issuing them are merely trustees, of a railway company; but it is the prevailing opinion generally that one who seeks a free pass, offering in return no present or

prospective consideration, "pecuniary or otherwise," does not receive it. It is true that the Congress of the United States found itself obliged to forbid the issuance of free passes by interstate railroads; but whether this was due to the fact that no real compliment was involved in the gift, the general character of the donees being well understood, or whether this action was taken primarily for the protection of the stockholders, or for that of the public, counsel are not advised. The subject evidently called for an expression of public policy.

Wherein consists the public policy contravened by stipulations against the responsibility of the public carrier for injuries due to its negligence or that of its servants?

Before citing the American authorities in detail or attempting an analysis of the decision of the learned court below, a brief review of the whole subject may be in order.

The struggle of the public against the railroad carriers has been an interesting one. In England there were four stages in the history of this conflict, ending in a complete judicial victory for the large and influential corporate interests, until in 1857 Parliament, in the railway and canal traffic act, came to the rescue of the public. The first stage was represented by the earlier English decisions, which permitted a common carrier of goods to exempt itself by private contract from the extraordinary liability as an insurer. The second stage was reached when this exemption of the carrier by private agreement was extended beyond a mere release from the extraordinary liability as an insurer and was permitted to include an exemption from ordinary liability for negligence. The third stage, which left the public helpless and throttled, was reached when for the private agreement

between the parties was substituted a notice by the carrier and a presumption of indirect assent by the shipper.

The point was now reached where the shipper, whether a bailor for hire or not, was in every case, without any proof of real assent to the agreement, bound by a presumption of indirect assent to the most unreasonable restrictions or limitations upon the carrier's liability, including the release of the latter from its ordinary liability for negligence. (This is the case at bar.)

At this stage it was found necessary in England that the "law should be made to conform to the moral sense" of the British public, and the railway and canal traffic act was passed. By it limitations of the common-law liability of carriers could be confined to those which were reasonable in character and the abuse of the doctrine of indirect assent was abolished; also by it even the pass-taker could be bound only by private agreement against the carrier's liability—when he signed his name at the bottom of the written or printed stipulation.

In the United States the law of passenger carriers, with the exception of the precise point at bar, has been perfectly well settled by this court, in which it has been held:

I. That passenger carriers are liable for the consequences of negligent acts to all passengers, gratuitous or otherwise.

Steamboat *New World vs.* King, 16 How., 469.

Phila. & Reading R. R. Co. *vs.* Derby, 14 How., 485.

II. That this liability cannot be evaded by private agreements, all such agreements being *per se* unreasonable in character and void as against public policy.

Vide Lockwood *vs.* R. R. Co., 17 Wall., 363.

In the only cases where this court was called on to pass on the validity or reasonableness of such agreements in the case of passengers other than those for hire, the court inevit-

ably discovered some consideration, "pecuniary or otherwise," which made it unnecessary to pass on the precise point presented by this appeal. The language of this court in its opinions and the criticisms contained in them of the very arguments which in every case have been relied upon by those courts which have sought to exclude the gratuitous passenger from his legal remedy are so persuasive of the impropriety of excluding the latter from the protection the public welfare requires should be thrown around all passengers that it is difficult to understand how any Federal court could have reached a contrary conclusion.

The Lockwood decision, as stated by this court in B. & O. Southwestern R'y *vs.* Voigt, 170 U. S., 505, "proceeded mainly on two principles. First, the importance which the law justly attaches to human life and personal safety, and which therefore forbids the relaxation of care in the transportation of passengers (note the omission of the words "for hire") which might be occasioned by stipulations relieving the carrier from responsibility." Second, "the position of advantage which is possessed by companies exercising the business of common carriers over those who are compelled to deal with them."

Are those two principles, and especially the former, less applicable today, and in the case of a free passenger, than they were in 1873, in the case of a drover riding on a pass given because of a shipment of cattle? As respects time, every passing year has but tightened the grasp of a few railways on transportation facilities, until today there is a virtual monopoly in a few hands of transportation between the most important American cities. As respects travelers, as distinguished from employees, what sound reason is there for a discrimination between travelers riding absolutely free and those riding on contracts based on considerations of slight and perhaps intangible value?

At the outset let us define what relation defendant bore to plaintiff. The three classes of persons on trains are passen-

gers, trespassers, and employees or quasi-employees. Plaintiff was on the train by invitation, and belongs to the first class.

Phil. & Reading R. R. Co. *vs.* Derby, 14 How., 485.
Steamboat *New World vs.* King, 16 How., 469.

As a consequence of that relationship, the law long ago settled the general duty of defendant to plaintiff to be as stated in the Derby case, *supra:*

"When carriers undertake to carry persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence, and whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passenger should not be left to the sport of chance, or the negligence of careless agents."

As said in Lockwood, *supra,* 377:

"In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence, the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raing the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case, the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms."

The first of the two principal grounds underlying the rule of public policy applied in the Lockwood decision to stipu-

lations for immunity for negligence on the part of passenger carriers is not controverted in terms by those decisions approved and followed in the case at bar by the learned court below, nor is it seriously contended that "the imporance which the law justly attaches to human life and personal safety, and which therefore forbids the relaxation of care in the transportation of passengers which might be occasioned by stipulations relieving the carrier from responsibility" (Voigt case, *supra*), does not apply with equal force to all passengers. The policy of those courts, on the other hand, has been consistently to ignore this fundamental and controlling consideration and to base the exception of the gratuitous passenger from the safeguard of law upon the supposed inapplicability to the latter class of passengers of the argument assigned by the Supreme Court in the Lockwood decision as a second and merely additional ground for holding such stipulations void as against public policy.

This second and additional argument is stated in the opinion of Mr. Justice Bradley in the Lockwood decision, as follows:

"If the customer had any real freedom of choice, if he had a reasonable or practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is almost concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality" (Lockwood, *supra*).

Is not this language of the Lockwood case as apt in expressing the situation of the person who for business or pleasure must travel between certain railroad points, but by voluntary offer of the carrier or on his own request is permitted to travel free, as that of the paying passenger? The pass-taker is, as we have seen in the Derby and King cases, a passenger. The carrier is a common carrier pursuing a public employment in which the exercise of the utmost care and fidelity for safety of passengers are its essential duties, and under the present arrangements, whereby a few carriers monopolize transportation, whatever conditions—whether of compensation, of conditions involving immunity of the carrier from liability for failure to perform its duty of safe transportation, or of improper, uncomfortable, or inadequate vehicles of transportation—the carrier cares to impose, the traveler wishing to go from one place to another must accept, subject only to his right subsequently to invoke the aid of the law to protect him. The pass-taker is as much under the real constraint referred to by the court in the Lockwood case and subsequent cases as any other passenger. *The constraint is a transportation constraint primarily,* AND NOT A COMPENSATION RESTRAINT, the latter, like the constraint under which the bailor agrees to exempt the carrier from bailment liability, being merely an incident of the former.

By the great weight of authority in this country stipulations against liability of common carriers for negligence are void even in the case of gratuitous passengers.

Bryan *vs.* Mo. Pac. Ry. Co., 32 Mo. App., 228.
Jacobus *vs.* Ry. Co., 20 Minn., 125.
F. & P. M. Ry. Co. *vs.* Weir, 37 Mich., 122.
G. C. & F. Ry. Co. *vs.* McGowan, 65 Texas, 643.
Mob. & Ohio *vs.* Hopkins, 41 Ala., 486.
Ala. Gt. S. Ry. Co. *vs.* Little, 71 Ala., 614.
Rose *vs.* D. M. V. Ry. Co., 39 Iowa, 246.
Ill. & Ont. Ry. Co. *vs.* Reed, 37 Ill., 484.
Fol. W. & W. Ry. Co. *vs.* Beggs, 85 Ill., 80.
Annas Adm. *vs.* M. N. Ry. Co., 67 Wis., 46.
Penn. Ry. Co. *vs.* Henderson, 51 Pa. St., 351. (Drovers' pass case, but followed up to full extent in Penn. Ry. Co. *vs.* Butler, 57 Pa. St., 335.)
B., P. & W. *vs.* O'Hara, 9 Am. & Eng. R. R. Cases, 317, Pa., 1881.
Camden & Atl. Ry. *vs.* Bausch, 7 Atl. Rep., 731.
Burnett *vs.* Ry. Co., 176 Pa., 45.
Vette *vs.* Harmon, 102 Fed. Rep., 17.
Roesner *vs.* Herman, 8 Fed. Rep., 782.
Flinn *vs.* P., W. & B. Ry. Co., 1 Houston (Del.), 471. (Drovers' pass case, but unusually well considered and shows court of same opinion as to purely gratuitous passenger.)
O. & M. Ry. Co. *vs.* Selby, 47 Ind., 471 and 487.
Ind. Central R. R. Co. *vs.* Mundy, 21 Ind., 48.
L. M. & A., etc., R. R. Co. *vs.* Faylor, 1260 Ind., 126.
Welsh *vs.* R. R. Co., 10 Ohio St., 76.
Curran *vs.* R. R. Co., 19 Ohio, 1.
Knowlton *vs.* Erie R. R. Co., 19 Ohio, 261.

This last case was decided against the passenger, as the contract was made in New York, but decided (p. 263) that the Ohio law is otherwise.

The text-writers are almost unanimous in opposition to the carriers' right to limit liability on a free pass.

See:

Redfield on Carriers, 268.
Thompson's Law of Carriers, p. 200, §§ 4, 7, 9.
Sherman's Redfield on Negligence, § 268, *et seq.*
Cooley on Torts, 686.
Wharton on Negligence, 589, 592, 641.
1st Parsons on Contracts, 771 (note).
Schouler on Bailments and Carriers (2d ed.), § 656.

The contrary decisions are:

Wells *vs.* R. R. Co., 24 N. Y., 181.
Perkins *vs.* Ry. Co., 24 N. Y., 196.
Bissell *vs.* Ry. Co., 25 N. Y., 443.
Kinney *vs.* Ry. Co., 32 N. J., 408.
Quimby *vs.* B. & M. Ry. Co., 150 Mass., 365.
Muldoon *vs.* S. C. Ry. Co., 35 Pac. Rep., 422.
Griswold *vs.* N. Y. & N. E. Ry. Co., 53 Conn., 371 (a quasi-employee case).
Payne *vs.* Terre Haute R. R. Co., 157 Ind., 617.

Of the foregoing the one New Jersey and all three of the New York decisions were by divided courts. Moreover, in the New York cases and the Massachusetts case distinctions were sought to be made between ordinary negligence and gross negligence, and between the negligence of the corporation itself and that of its agents.

The invalidity of these distinctions, though helpful to the case at bar (in which the negligence was that of the defendant itself, and of the grossest kind), has been clearly pointed

out in the Lockwood case (*supra*), which, it is of interest to note, came up for review from New York and resulted in a reversal, the Supreme Court distinctly refusing to follow the New York cases.

The Voigt case was cited below by the appellee, but a perusal of that case (176 U. S., 518) will show that it belongs to a separate group of cases, and that in the decision the court reitered its views as to the invalidity of stipulations against liability to passengers. The Voigt case was decided in favor of the railway company on the ground (which in passing it may be said was the real ground upon which the Griswold case, cited below by the appellee, should have been placed) that Voigt, an express messenger, was in no sense a passenger, but rather an employee who had voluntarily assumed the risk of his fellow-servants' negligence. The court, however, in again reviewing the question of common carriers seeking to stipulate against their negligence held (italics ours):

"That *all* attempts of carriers by general notices or special contract to escape from liability for losses to *shippers or injuries to passengers*, resulting from want of care or faithfulness, cannot be regarded as reasonable and just, but as contrary to a sound public policy and therefore invalid."

Moreover, in the Voigt case, not only was the Lockwood decision distinguished on the ground that public policy does not in the case of carriers impose a liability toward an employee or quasi-employee in a case where such liability is not generally imposed by law upon other employees, as in the case of injury through the negligence of a fellow-servant, the risk of which was voluntarily assumed as a part of his employment, but also upon the ground that an express messenger, unlike a passenger, gratuitous or otherwise, is not under any transportation constraint—*i. e.*, he is not in the position of one of the public who is on the passenger coach in which and by means of which alone he can be transported

from point *a* to point *b*, and in order to arrive at his destination has no choice but to ride in that passenger coach and to ride in it upon whatever conditions, reasonable or otherwise, the carrier, who is a monopolist of the means of transportation between point *a* and point *b*, may care to impose.

The constraint upon the express messenger is to assume the risk of accident incidental to his employment, or seek employment elsewhere. As this form of constraint exists in the case of every employee, and is imposed by law as being in accordance with a sound public policy, and grows in no way out of any inequality of position between employer and employee, the messenger cannot complain that he is not put on a par with the passenger, the constraint upon whom is the result of a transportation monopoly, beneficial as it may be in certain aspects, but a monopoly which nevertheless denies him the freedom of contract enjoyed by the servant or messenger. The fundamental distinction between the Lockwood and the Voigt cases rests upon the fact that there is a monopoly of transportation; but in this country there is no monopoly of employment. To show how little the Voigt case, so much relied on, is in point, Voigt was held not to be a passenger, although his transportation was paid for by the express company.

The reasoning used by the learned court below covered almost every argument advanced by other decisions in favor of immunity to the carrier, and, it is respectfully submitted, will be found on analysis inadequate to justify the conclusion reached.

The learned court below, after stating the proposition involved under this head of the appellant's contention, in the following terms, "The ground of that contention is, that the occupation of a common carrier is of such a nature that it would conflict with settled public policy to permit one,

under any circumstances, to stipulate against liability for injuries resulting from negligence in the performance of its duties" (opinion of the court, Rec., p. 20), frankly admits the weight of American authority to favor the affirmative (Rec., p. 20), but proceeds to set forth at some length the grounds upon which it feels constrained to join the minority in holding a contrary view:

"It cannot be denied that the duty of the common carrier is to carry its passengers in safety, and that this duty is not dependent upon contract alone; that the duty is in the nature of a public one and that the public interest is directly involved in its performance. For these reasons, a sound, well-established rule of public policy will not permit the carrier to impose special terms of an unreasonable nature (as, for example, the assumption of the risk of damage occasioned by the negligence of the carrier or its agents), upon one who, practically compelled to avail himself of its services, nevertheless pays something in the shape of valuable consideration therefor. To uphold a condition exempting the carrier from liability for negligence under such circumstances would strongly tend to induce a relaxation of that high degree of care essential to the safety of the multitudes who daily avail themselves of the services of common carriers. But sound and expedient as this rule of public policy undoubtedly is, under the conditions before stated, we cannot bring ourselves to the conclusion that the reasoning on which it is founded has any application to the case of one who accepts a free passage as a gratuity.

"A strictly free passenger does not higgle with the carrier and consent to the condition in order to obtain a reduced rate of passage, nor does he consent to it in order to obtain a reasonable rate of freight for property which he must accompany or follow to its destination. There is no inequality between him and the carrier in the transaction, for he is not one who, being practically compelled to take passage, and having the right to demand it upon a reasonable consideration, is unable to resist the imposition of special terms. He is a mere seeker and recipient of favor, and ought to be estopped to repudiate the condition upon which that favor was conferred. So to hold—to use the appropriate words of Judge Putnam in the circuit court in a recent and like case—

'conforms the law to the moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they were granted.' Duncan *v.* Maine Central R. R. Co., 113 Fed. Rep., 508" (opinion of the court, Rec., p. 21).

The first ground of opinion appears, therefore, to be based upon the assumption that the rule of public policy which condemns special contracts by public carriers for exemption from negligence has its origin and sanction in the inequality of position between the carrier and the pay passenger, and, further, the reason for the rule ceasing in the case of gratuitous passengers, these "mere recipients of favor" are not within its protection. Before discussing the merits of this contention, in order to disembarrass the argument to follow, a brief criticism of the two other grounds of decision quoted from the Quimby and Duncan cases and approved and followed by the learned court below may be here permitted.

The first of these is as follows (italics ours):

"Our conclusion accords also with that of the supreme judicial court of Massachusetts in a well-considered case, and the reasons therefor are so well stated in their opinion that we shall quote from it at length: 'There can be no difficulty in the adjustment of terms where passes are solicited as gratuities. * * * *The instances cannot be so numerous that any temptation will be offered to carelessness in the management of their trains, or to an increase in their fares, in both of which subjects the public is interested.* In such instances, one who is ordinarily a common carrier does not act as such, but is simply in the position of a gratuitous bailee. The definition of the common carrier, which is that of a person or corporation pursuing the public employment of conveying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to the solicitations of the passenger, he consents for the time being to put off his public employment, and to do that which it does not impose upon him'" (opinion of the court, Rec., p. 21).

Those parts of this contention upon which the more stress has been laid have been completely answered by this court in the Lockwood case.

Opinion of Bradley, J., in Lockwood *vs.* R. R. Co., 17 Wall., 363, p. 376:

"It is argued that a common carrier by entering into a special contract with a party for carriage of his goods or person on modified terms drops his character and becomes an ordinary bailee for hire and therefore may make any contract he pleases, that is, he may make any contract whatever, because he is an ordinary bailee, and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation and not by virtue of the responsibilities under which they rest."

"The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a private carrier. Still, is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods? A common carrier undoubtedly may become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry."

P. 378: "But where a carrier has a regularly established business for carrying all or certain articles, and especially that carrier is a corporation created for the purposes of carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier and a special contract about its responsibility does not divest it of that character."

P. 377: "But it is contended that although a carrier may not stipulate for his own negligence there is no good reason

why he should not be permitted to stipulate for indemnity for the negligence of his servants, over whose actions in his absence, he can exercise no control."

P. 378: "Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the services which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in business. To admit such a distinction of the law of common carriers, as the business is now carried on, would be subversive of the very object of the law."

By reference to the italicised portion of the opinion in the Quimby case, however, it is open to inference, at least, that the learned judge who wrote that opinion had himself some misgivings as to the soundness of the contention that a public carrier ceased to be such by virtue of the particular contracts it might be pleased to make, and that there was a valid distinction between liability for agent's negligence and negligence by the corporation itself, and therefore based his decision, in the alternative, upon the theory that—

"The instances cannot be so numerous that any temptation will be offered to carelessness in the management of their trains, or to an increase in fare, in both of which subjects the public is interested."

Is the question then to be decided, not upon legal principle but upon transportation statistics? Apparently the court would have come to a different conclusion had it been competent for counsel to show, as the Indiana court did in Payne *vs.* Terre Haute Ry. Co., 157 Ind., 617, the class of gratuitous passengers to have been more numerous, although the judicial determination as to exactly what percentage of its total number of passengers the carrier could safely be permitted to be negligent without involving some diminu-

tion of care to its pay passengers undoubtedly would have been embarrassing.

Although the number of free passengers has been such as to cause the Congress of the United States to prohibit, in the case of interstate commerce carriers, this particular form of corporate eleemosynary enterprise, to the plaintiff at least, it seems that the proper solution of the question belongs to the domain of established legal principle rather than to the mathematical theory of probabilities. The rule of public policy forbidding such special contracts was intended as a safeguard not against $\frac{9}{10}$ nor yet against $\frac{99}{100}$ of the tendency to carelessness, which exemption from its consequences would be calculated to promote, but on the other hand to eliminate such tendency altogether; and by holding, as the least with which the law would be satisfied, not a mere degree of care commensurate with the amount paid for carriage, but in every case, pay or no pay, the extremest care on the part of those who employ "the powerful but dangerous agency of steam;" the courts have impliedly recognized this to be the true foundation of the rule, and this court in Railroad *vs.* Derby (14 How., 468) refused to consider the gratuitous carriage of Derby a ground for exonerating the company from any liability except that of a gratuitous bailee for the benefit of the bailor—*i. e.*, as stated by writers on the subject of bailment, as a degree of skill and care less than that expected from an ordinarily prudent man who might have undertaken the same bailment for hire. In Lockwood, *supra*, this court refused to follow the New York courts, which held he could have paid the lawful statutory rate of fare. (See also Steamboat New World *vs.* King, 16 How., 469.) This court was certainly justified in failing to appreciate any striking analogy between a bale of goods and a human being.

But the most satisfactory, because the most practical, answer to this branch of the contention is to be found in the opinion of the court in Jacobus *vs.* St. Paul Ry. Co., 20 Minn., 127.

"The care and vigilance which the carrier exercises do not depend alone upon a mere sense of responsibility, or upon the existence of an abstract rule imposing stringent obligations upon him. It is the enforcement of the rule and of the liability imposed thereby, the mulcting of the carrier for his negligence which brings home to him in the most practical, forcible, and effectual way the necessity for strictly fulfilling his obligations. It may be that on a given occasion the gratuitous passenger is the only person injured who will proceed against the carrier, and practically enforce on the carrier the faithful discharge of his duty. These considerations ought to be decisive of the point that public policy requires that the rule as to the liability of the carrier for the safety of the passenger should not be relaxed though the passenger be riding on a conditioned free pass."

And further from the following extract from the opinion of this court in the Lockwood case (*supra*).

Commenting on the argument that the New York doctrine would not render railroads less careful, the court said:

"The fruits of this rule," says Judge Noah Davis in Stenson *vs.* N. Y. Central, 32 N. Y., "are already being gathered in increasing accidents through the decreasing care and vigilance on the part of these corporations and they will continue to be gathered until a just sense of public policy shall lead to legislative restriction on the power to make this kind of contracts."

In the case of Rose *vs.* Ry. Co., 39 Iowa, 246, all persons on the train were free-pass takers or employees.

The third and last ground of decision relied upon by the learned court below is based, it is respectfully submitted, upon an erroneous supposition and must fall with it. It is to this effect:

"After careful consideration of the opposing decisions by learned courts for whose opinions we have the highest respect, we are constrained to say that we fail to see any substantial grounds for invoking a rule of public policy that would permit the free pass in this case to stand as a contract

of carriage, and strike down the condition without which it would not have been given. The plaintiff had no right to demand carriage without consideration; the carrier was under no obligation to furnish it. Instead of purchasing an unconditional ticket, as was done for the friend who traveled upon their invitation, she accepted free transportation upon express condition."

In the Derby case above cited, certainly whatever rights the negligence of the defendant may have given him, it could not be contended that had the railroad refused to carry him save upon his paying the usual and reasonable fare, he could have maintained an action against it for failure to transport him; nor has the appellant in the case at bar ever contended that she had "the right to demand carriage without consideration." She did have the right to demand, however, that her bodily integrity be respected, and she submits that her consent, even had it been duly obtained beforehand, would not have excused the defendant for killing or maiming her carelessly, any more than it would for killing or maiming her feloniously. Indeed, for want of capacity to entertain the necessary intent, the defendant is limited to the former method of dealing with the too-confiding "recipients of its favor."

The real facts of the case at bar abundantly disclose that whatever may have been the connection between her husband's contract for advertising the defendant and the free pass given him in her name, the plaintiff was merely in the position of one on the train of the defendant, not by her solicitation, but by its kind and most disinterested invitation, and being injured while thereon by a supreme degree of negligence, by no means solely attributable to its mere servants, is told she is without redress because of a condition attached to this invitation, which it was never thought necessary to apprise her of, she being, in the language of the learned court below, "in no sense a passenger for hire." (Opinion of the court, Record, p. 50.)

We now return to the argument of the learned court below, which assumes the inequality of position between the pay passenger and the carrier to be the reason for the rule of public policy sought to be invoked in behalf of the plaintiff, and denies its protection to her on the theory that there is no such inequality in her position, and that, the reason for the rule ceasing, the rule itself ceases.

It will be seen that the learned court below has joined the ranks of those courts referred to heretofore, which, ignoring the equal applicability to gratuitous passengers of the *primary* reason assigned in the Lockwood case for holding stipulations such as the one which figures in this case void as against public policy, on the other hand has rested its conclusions to the contrary chiefly on the supposed inapplicability to gratuitous passengers of the second and merely additional argument used by this court in the Lockwood and subsequent decisions.

Moreover, the learned court takes the position that there is an inequality of position between the carrier and the pay passenger growing out of the carrier's practical monopoly of the facilities of transportation, by which the assent of the pay passenger to stipulations may be coerced, but that this monopoly, and consequent power of coercion, bears some mysterious relation to the rate of fare demanded, increases as the fare increases, and diminishes as the fare diminishes, until, if no fare at all be demanded, it ceases altogether.

Not only, therefore, does the public-transportation monopolist cease to become such as to the so-called gratuitous passenger, but the State ceases to have any concern for the preservation of his physical integrity. If such be the law and the number of free passes increases, the problem of race suicide need not concern the public mind. An alternative more in conformity with the moral sense is at hand.

Admitting, for the sake of argument, the second of these premises and conceding that had fifty cents been demanded of the plaintiff and paid by her, that circumstance would

immediately have created an inequality of position between her and the defendant railroad company which otherwise could not exist, and would have nullified the special contract in question, the assumption contained in the first premise is, obviously, the result of the application to carriers of passengers of imperfect analogies from the law of common carriers, and as to the former is supported neither by reason nor authority.

Dr. Schouler, in his work on Bailments and Carriers (s. 342–'3, p. 35, 2d ed.), defines a common carrier to be a *public carrier of goods for hire*. The extraordinary liability of an insurer which the English law attaches to the occupation of a common carrier was based upon a fear, founded upon the early state of English society, that collusion with the enemies of society might, save for this reason, leave the shipper remediless.

See—

3 Co. Litt., 89*a*; 1 Co. Inst., 89*a*; Moore, 462.

Lord Holt in Coggs *vs.* Bernard, 2 Ld. Raym., 909, 918.

Were no other justification for the continued imposition of this rule to be found in the conditions of modern society, it must long since have passed into desuetude.

With the introduction of steam and electricity and the monopoly of this important business by great corporations another sanction for the rule imposing this extraordinary liability is found in the inequality of position between the shipper and the common carrier. The real importance, however, of this change of base lies in the fact that to have allowed in the time of Lord Coke any limitation by private contract of the common-law liability of an insurer would have defeated its very purpose, while, on the contrary, not to allow such limitation within reasonable bounds would be, under modern conditions, to uselessly harass and burden a great branch of industry. Well, then, might the modern

courts in many cases, bearing in mind the definition of a common carrier as a public carrier of goods for hire and remembering the modern basis of the rule affecting them with the extraordinary liability of insurers, hold, as they do, that, there being no such inequality of position between the gratuitous bailor and the common carrier, the liability of the latter, even in the absence of a special agreement to that effect and *a fortiori*, if such there be, is but that of a gratuitous bailee for the benefit of the bailor. However much confusion may have resulted from the application of this doctrine to passenger carriers, especially when the question is complicated by the carriage of the passengers' baggage, it is obvious no real analogy is disclosed.

"It is only in an age comparatively modern that the public transportation of persons from place to place, on hire, has in England and America called for the intervention of courts and the unfolding of legal principles."

Schouler, sec. 612, p. 648, 2d ed.

The element of hire, while generally present and the motive for engaging in the pursuit, is not a necessary part of the definition of the carrier of passengers, and one is none the less a passenger from whom, for special reasons, no hire is demanded.

Phila. & Reading R. R. *vs.* Derby, *supra.*

Steamboat *New World vs.* King, *supra.*

Moreover, while this inequality of position has not infrequently been assigned as an additional reason (drawn from some supposed analogy to the rule affecting common carriers) for the application of a like rule to pay passengers, it is submitted that the paramount consideration growing out of the requirement of a philanthropic age that the standard of duty of passenger carriers be kept up to a degree commensurate with the terrible consequences that must inevitably

ensue, "whether the consideration be pecuniary or otherwise" or altogether absent, if "the personal safety of passengers" "be left to the sport of chance or the negligence of careless agents," originates and rests upon no analogy, but inheres in the very nature of the occupation of the carriage of human beings by the powerful but dangerous agency of steam.

Railroad *vs.* Lockwood, 17 Wall., 374.

Moreover, this court in the Lockwood decision and subsequent cases, while confining itself to the precise points presented for adjudication, has used language in its opinions which indicates a strong bias in favor of the universality of the rule contended for; and upon this subject Schouler gives the following résumé of the authorities discussed in his work upon Bailments and Carriers (contrasted with that announced by the New York and New Jersey courts):

"But the safer rule, and that which a broader appreciation of the public welfare seems to favor, is to the contrary; and the best supported American doctrine, which is fortified by the powerful sanction of the Supreme Court of the United States, views all these distinctions between free and paying passengers as unsound. According to this view of the carrier's liability there is an obligation imposed by public law which is superior to and independent of all private agreement; and whether it be upon a drover's pass, or any other free or limited ticket, whether upon expressed terms of restriction or otherwise, the carrier cannot shield himself from the consequences of his negligence; but towards all passengers the utmost care and diligence must be used, and the standard of duty must be according to the consequences that might ensue from carelessness."

Schouler on Bailments and Carriers, 2d ed., sec. 656, p. 714.

And in Railroad *vs.* Stevens, 95 U. S., 655, the court reviews the Lockwood decision in these words:

"Since, therefore, from our view of the case, it is not necessary to determine what would have been the right of the

parties if the plaintiff had been a free or gratuitous passenger, we rest our decision upon Railroad Company *v.* Lockwood. We have no doubt of the correctness of the conclusions reached in that case. We do not mean to imply, however, that we should have come to a different conclusion had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case, and it is often asked with apparent confidence, 'May not men make their own contracts,' or, in other words, 'May not a man do what he will with his own?' The question at first sight seems a simple one. But there is a question lying behind that, 'Can a man call that absolutely his own which he holds as a public trust, by the public grant, and for the public use as well as for his own profit?' The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which that public service shall be performed by private enterprises are not yet entirely settled. We deem it the safest plan not to anticipate questions until they fairly arise and become necessary for our decision."

And in the Voigt case, after deciding in favor of the railroad company on the express ground that Voigt was not a passenger in any sense of the word, but, on the contrary, by his agreement expressly assumed, as a risk of his employment by the express company, any injury that might result from the carelessness of the agents employed in hauling the express car, and who were in a sense his fellow-servants, this court, again reviewing the question of carriers of passengers seeking to stipulate against their negligence, held (italics ours):

"That *all* attempts of carriers by general notices or special contract to escape from liability for losses to shippers or injuries to passengers, resulting from want of care or faithfulness, cannot be regarded as reasonable and just, but as contrary to a sound public policy and therefore invalid."

It is not contended that a public carrier necessarily has its duties to the public increased in proportion to the special benefits derived from the public in a charter of incorporation, but its charter does place certain duties and obligations on it.

The defendant in error, by the admission of the pleadings a corporation chartered as a public carrier of passengers, is sought to be held upon considerations based solely upon the nature of its employment.

Apart from its charter as such, the law imposes upon the carrier of passengers, as a matter of sound public policy, the duty to use the greatest care, skill, diligence, and foresight in the transportation of passengers.

This, then, as stated in the Lockwood case, *supra*, being an essential duty of the carrier toward the public, can the carrier, ignoring the State which created it, take the privileges and benefits conferred, and by private contract relieve itself from a burden in its very nature inherent in and inseparable from the carrier's public, corporate existence? It is true that the right of private contract is no small part of individual liberty, and in recognition of that fact the carrier has been permitted to stipulate against responsibility as an insurer. But there the line has been drawn. In the lives of its citizens the State has an interest. The carrier by its compact with the State has undertaken to exercise the highest diligence in order not to imperil any of those lives held sacred by the laws of all civilized States, and by no act of third parties can it divest itself of those duties, obligations, and liabilities. If it wishes to be relieved of the burdens that are an essential incident to its employment, it must secure relief from the State with which it publicly covenanted, and not from some stranger to that compact. As said by the supreme court of the District of Columbia in Galt *vs.* Express Co., MacArthur and Mackey, 138, the carrier's duty

to the public "can neither be put aside nor impaired by the consent of individual members of the community." (See also Oscanyan *vs.* Arms Co., 103 U. S., 261; C., M. & St. Paul R. R. *vs.* Solan, 109 U. S., 135.) The carrier recognized Mrs. Boering as lawfully on its train, and this court has decided in Steamer *New World vs.* King, and the Derby case, *supra*, that she was there as a passenger and entitled to the same degree of care as if she had paid fare; and in the Lockwood case, *supra*, that the carrier's employment, and not its compensation, determined its duties and liabilities.

Those duties and liabilities, being placed there by operation of law, could not be sloughed off by private agreement inconsistent with and hostile to the public duties the carrier voluntarily assumed. The New York and other courts, which the United States Supreme Court has overruled, recognizing the force of this argument, upheld the validity of conditioned free passes on the ground that as to such passengers the carrier was divested of its public capacity and was a mere ordinary and gratuitous bailee. But, as we have seen, Lockwood, *supra*, the Supreme Court holds it is the employment, and not the remuneration or responsibilities, that determines the carrier's character, and its character being defined, so likewise is its duty and liability.

This fundamental consideration should be controlling.

POINT 2.

Even those States which permit a common carrier to limit its liability to gratuitous passengers require an express contract to that effect by the passenger.

The learned court below appears to have attached but the slightest importance to this point and disposes of it as follows:

"Now if the plaintiff had been able to show that the pass had been issued to her under conditions sufficient to make her carriage one for hire in any legal sense, then, (assuming that we need not determine, namely, that she was not bound by the agency and knowledge of her husband), it would, undoubtedly, have been competent for her to show that her attention had not been called to the indorsed stipulation, and that she had never given her assent to it. The Majestic, 166 U. S., 375, 385.

"But, as before stated, the plaintiff was in no sense a passenger for hire, and hence it was of no consequence whether or not she knew of and had assented to the assumption of the risk of accident imposed by the indorsement. No matter what may have been the authority of her husband to act for her in the original receipt of the pass, she accepted it and willingly availed herself of its privilege, and must, therefore, be held bound by its conditions. Quimby *v.* Boston and Maine RR., 150 Mass., 365, 367; Griswold *v.* N. Y., etc., RR., 53 Conn., 371; Muldoon *v.* Seattle R'w'y Co., 10 Wash., 311; I. C. RR. *v.* Read, 37 Ill., 486.

"The gift and the condition were interdependent and inseparable. She could not enjoy the gift without subjecting herself to the operation of the condition upon which it was made."

At this point it may be as well to call attention to the fact that the evidence fails to show any knowledge on Mrs. Boering's part that the "transportation" was a gift, if such, in fact, as to any one.

Before citing the only authorities which have seemed to the appellant to be in point on this proposition, it may be permitted to inquire upon what possible theory a contract can be upheld as a valid contract by which the defendant can escape the operation of a well-established principle of public law, where at the same time it is held unimportant that the contract can be shown to have been entered into at all.

Says the learned court below:

"Undoubtedly the principle of decision in Railroad *v.* Derby, 14 How., 468, can have no application, because there the plaintiff rode on the special invitation of the president of the company without stipulation or condition whatever" (opinion of the court, Rec., p. 20).

The court then says on the same page of the opinion:

"But as before stated, the plaintiff was in no sense a passenger for hire, and hence it was of no consequence whether or not she knew of and had assented to the assumption of risk of accident imposed by the indorsement" (opinion, Rec., p. 20).

Derby, "in no sense a passenger for hire," can recover because he did not stipulate away his right of action; the plaintiff, "in no sense a passenger for hire," cannot recover because it is of "no consequence" that she did not stipulate away her right of action!

While it is well settled that notices by carriers, whether published in general notices or otherwise promulgated, are to be generally regarded merely as offers to carry upon terms other than those which in the absence of agreement between the parties the law will supply, and as such must be consented to, or, as the law of contracts phrases it, "accepted," before the legal relations of the parties can be affected thereby, it is submitted the burden of proof of this

contract offers no exception to the rule that the party setting it up must prove its execution.

American Transportation Co. *vs.* Moore, 5 Mich., 368.
Cooper *vs.* Berry, 21 Ga., 526.
Roberts *vs.* Riley, 15 La. Ann., 103.

Nevertheless, it is admitted that when parties reduce their agreement to writing, or when a written instrument such as a bill of lading or express receipt is universally understood and recognized in the commercial world to contain the written terms of the contract of shipment, one who accepts such a bill of lading or express receipt and ships under it will be held to its terms, so long as they are reasonable, whether the shipper chooses to peruse them or not. The bill of lading and all of its terms, whether written or printed on the face of the instrument, will bind those who agree to it as an expression in writing of their mutual agreement. In this sense we understand the learned court below to speak, for it is the only intelligible meaning of the words, when it further says:

"The gift and the condition [printed on the back] were interdependent and inseparable. She could not enjoy the gift without subjecting herself to the operation of the [otherwise uncommunicated] condition upon which it was made."

If it can be sustained at all, it will be seen that this contention can only be sustained upon the theory that an ordinary railroad ticket, and still more a free pass, are customarily known and understood to contain the written terms of the contract of carriage; if, indeed, that which is necessarily void for want of consideration could ever be assumed to be a contract at all. We submit that it by no means follows that because one's ticket or token of transportation is a free pass there is any condition of exemption of liability of the carrier attached to it. There are free passes, and many of them, containing no such stipulation, and the law does not

take judicial notice that free passes have any such stipulation, and neither was the real plaintiff in this action bound or required to take notice that by riding on invitation of her husband on "transportation procured in conjunction with a contract of advertising" there was a waiver of any right of action she might have against the carrier, or to know that her fare had not been paid for. Indeed, she had a right to assume it had been paid for, "pecuniarily or otherwise." This is not a case where a presumption of knowledge will apply.

The law, however, is well settled on this point.

We quote again from Schouler (*supra*), § 468, page 497:

"And so, too, for similar reasons, our American current of authority sets against sustaining special conditions which the carrier has printed, written or stamped upon the back of his bill of lading, receipts or tickets; requiring affirmative proof in such a case, that the sender's attention was so called to the same, and so seasonably that his assent, as bailor, suitably extended to both sides of the instrument, which appears to be likewise, though less clearly, the English rule.

"Fraudulent intent on his part is not essential here, in order that the carrier be debarred from asserting the stipulation; but the fact that his course has put the consignor, in the matter of giving indirect assent at a decided disadvantage," citing—

R. R. Co. *vs.* Manuf. Co., 16 Wall., 318.
Brown *vs.* East R., 11 Cush., 97.
Newell *vs.* Smith, 49 Vt., 255.
Ayers *vs.* West R., 14 Blatchf., 9.

And this notwithstanding the face of the ticket or document refers the reader to the back.

Malone *vs.* Boston & W. R., 12 Gray, 388.
Railroad Co. *vs.* Manuf. Co. (*supra*).

The true issue is whether a certain special contract was entered into, and of this the proof required conforms to the ordinary rules of evidence.

Am. Trans. Co. *vs.* Moore, 5 Mich., 368.
Cooper *vs.* Berry, 21 Ga., 526.
Roberts *vs.* Riley, 15 La. Ann., 103.

Mrs. Boering's right of action sounds in tort, but the defendant's exemption from liability is wholly contractual. The burden was on defendant, and it has failed wholly to show any contract.

If a carrier claims that by contract his common-law liability has been limited, the burden is on him clearly to show it, and all such contracts will be interpreted most strictly against the carrier. Assent will not be presumed from facts and circumstances which do not clearly show an assent to such conditions in the contract on which the action is founded. In the absence of satisfactory proof showing that the shipper by assent and acquiescence has agreed to limit the liability of the carrier, the presumption is that he intended to insist on his common-law rights. Neither usage nor custom, though known to the shipper, which he has not clearly assented to as a condition of the contract of shipment can be set up to absolve the carrier from his common-law liability.

P. C. & St. L. R. Co. vs. Barrett, 36 Ohio St., 448.
Rosenfeld vs. Peoria R. R., 103 Ind., 121.
Jennings vs. Grand Trunk, 127 N. Y., 438.
Amn. T. Co. vs. Moore, 5 Mich., 368.
Edsall's case, 50 N. Y., 661.

So strong is this principle that in Mauritz vs. R. Co., 23 Fed. Rep., 765, it was held that a passenger unable to read the language in which a ticket is printed and to whom no explanation is made by the agent is not bound by special terms and conditions, as it was not, per se, negligence in him not to know them.

See also—

Blossom vs. Dodd's Express, 43 N. Y., 269.

Camden & A. R. Co. vs. Baldauf, 16 Pa. St., 67.

In Perkins vs. N. Y. Cent., 43 N. Y., 269, the court expressly placed its decision on the ground that Perkins had the terms of the contract pointed out to him and had six hours to read it. The present is not a case in which that case or Boylan vs. Hot Springs, 132 U. S., 146, would apply.

Of course, such a contract may be verbal or may even be inferred from circumstances, as from the acceptance of a pass and assent to the stipulations or conditions under which it is issued, but the only decisions of which we are aware are unanimous in requiring such knowledge and assent as a condition to holding the passenger bound thereby.

"But admitting the right of the common carrier thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be

permitted to discharge him from duties which the law has annexed to his employment."

New Jersey Steam Nav. Co. *vs.* Merchants Bank, 6 How. (U. S.), 344.

Mich. Cent. R. Co. *vs.* Hale, 6 Mich., 243.

The New York courts, which we have seen *supra* are among the minority in favor of relaxing the common-law liability of carriers, are at one with the decisions of the Supreme Court in requiring an express assent by the passenger to any stipulation against such liability.

"A contract exempting a carrier from liability for injury to its passengers, to be binding on the passenger, must be made by him or by some one authorized to act in his behalf."

Seyboldt *vs.* N. Y., etc., Ry. Co., 95 N. Y., 562.

See also Brewer *vs.* N. Y. C. Ry. Co., 124 N. Y., 59.

In Coppock *vs.* Long Island R. Co., 89 Hun., 186, where the owner of a horse had employed the plaintiff to travel in the car with the horse, and the plaintiff was injured, it was held that he could not be bound by a stipulation in the contract between the carrier and his employer, limiting the liability of the former, in the absence of proof that the stipulation was brought to his knowledge and assented to by him.

In Brewer *vs.* N. Y. L. E. W. Ry. Co., 124 N. Y., 59-64, the court says (italics ours):

"It, however, does not appear that the plaintiff's intestate had any knowledge or information of the provisions of the contract between the two companies. When he entered into the service of the express company he assumed the ordinary hazards incident to that business in his relation to that company, but there was no presumption or implied understanding that the messenger took upon himself the risks of injury he might suffer from the negligence or fault of the defendant. He was in no sense the employee of the defendant, nor

could he, without his consent, be subjected to the responsibilities of that relation (Mo. Pac. *v.* Ivy, 17 Tex., 409). *He was lawfully in the car * * * and, although he paid no fare, was carried by virtue of no contract made by him personally with the latter, and must have understood that he was there pursuant to some arrangement of his employer with the defendant,* he was not necessarily by that fact chargeable with notice of the provisions in question of the contract. Presumptively he was entitled to protection against personal injury by the negligence of the defendant. And it is not seen how Brewer could, without his knowledge and consent, be placed in such relation to the defendant as to relieve it from liability to him for the consequences of his negligence affecting him personally."

In Louisville Ry. Co. *vs.* Nicholai, 4 Ind. App., 119, the court lays down this rule:

"Proof of the assent must be clear, for the law having imposed an important duty upon the carrier upon grounds of public policy, will not permit it to divest itself of this responsibility and throw the loss upon the other party, where the proof that the latter has so agreed is doubtful."

In the case at bar the only evidence heard below established clearly that the plaintiff, while she knew she was traveling on "transportation" procured in conjunction with an advertising contract, never had had the transportation in her possession, and did not know there was any stipulation on the back thereof, did not assent to same, and authorized no one to do so for her. The record discloses that at the time the pass was offered in evidence the defendant on cross-examination had elicited the fact that the plaintiff had never seen the pass until after the accident. She knew she was traveling on "transportation" procured "in conjunction with the contract for advertising," but nothing beyond this. It was not until the pass was admitted in evidence that further testimony was heard relative to the circumstances under which it had been issued, the plaintiff being left no alternative except an at-

tempt to bring the case strictly within the views of the court below with respect to showing value given for the pass.

The evidence offered upon that point seemed sufficient, but the trial judge refused the plaintiff's second and third prayers, and in granting the first prayer gave the jury such an instruction as to what the law considered value for a ticket that the jury was obliged to find for the defendant.

The circumstances under which the passes were issued and the testimony of Mr. and Mrs. Boering are conclusive upon the following points:

(*a.*) Mrs. Boering did not authorize her husband to procure any transportation whatever for her, and he was in no sense her agent.

(*b.*) Mrs. Boering had no notice of the stipulation on the back of the pass issued to her husband in her name, but retained by him.

It would appear, therefore, that, even if the stipulation were not void on the ground of public policy, the trial court erred in admitting it in evidence.

It is likewise clear that the trial judge was in error in refusing to permit Mr. Boering to testify further as to Mrs. Boering's ignorance of the stipulation on the back of the pass bearing her name. Counsel for the defendant based his objection on the ground that such evidence was immaterial, and that the trial judge had already so decided. The suggestion by the trial judge that "this evidence if material at all ought to have been brought out in the examination-in-chief" was purely voluntary. It would be a singular practice to compel the plaintiff to anticipate the defense and bring out testimony in rebuttal during the examination-in-chief.

If, as her husband merely, he could not release her right of action, did that relation constitute him her agent to agree upon the release in question?

"The express or implied assent of the sender or owner in due season, which is here requisite, may doubtless be given through the medium of agents, yet the sender's agent for delivering goods to the carrier for transportation is not necessarily his agent for binding him to special modifications of the carriage contract."

Schouler (*supra*), § 470, p. 500, and cases there cited.

Now, her right to sue for damages for injury to her person inured solely to her benefit, and nothing is better settled than that the husband may be constituted the agent of his wife for the disposal of her separate property, but that he is not such merely by virtue of the marital relation. (See Am. and Eng. Ency. (2d ed.), title Agency, p. 958.)

In McLaren *vs.* Hall, 26 Iowa, 297, the court held that although the husband may act as agent for the wife, yet, in order to bind her, he must be previously authorized to act as her agent or she must subsequently, with express or implied knowledge of his act, ratify it, and that the evidence necessary to establish a ratification in such case must be of a stronger and more satisfactory character than that required to establish a ratification by the husband of the act of the wife as agent or than as between independent parties.

The sole remaining question, therefore, is, Did the appellant either previously authorize Mr. Boering to procure transportation for her upon the condition in question, or, with knowledge express or implied, did she ratify his act in so doing?

An inspection of the record admits of but one answer. The circumstances under which the transportation was given to Mr. Boering show that he acted upon his own initiative if not, indeed, upon that of Passenger Agent Lewis, and his own and Mrs. Boering's testimony shows that the latter, so far from ratifying the stipulation, was ignorant of its existence until after the accident, likewise was ignorant that she was riding on a free pass, if there were one in this case, and

neither had authorized nor acquiesced, expressly or impliedly, for implication requires knowledge or strong reason for inquiry, in her husband procuring her a free pass and waiving her common-law liability.

Respectfully submitted.

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